Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Federal-State Joint Board on	)	CC Docket No. 96-45
Universal Service	)	
	)	
To: the Commission	)	

PETITION FOR RECONSIDERATION

Gerard J. Waldron
Mary Newcomer Williams
John Blevins
COVINGTON & BURLING
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20004-2401
Tel.: 202-662-6000
Fax: 202-662-6291
Counsel to TDS Telecommunications

David W. Zesiger
Executive Director
INDEPENDENT TELEPHONE &
TELECOMMUNICATIONS ALLIANCE
888 16th Street, N.W.
Suite 800
Washington, D.C. 20006
Tel.: 202-355-1388
Fax: 202-355-1399

Derrick B. Owens
Director of Government Affairs
WESTERN TELECOMMUNICATIONS ALLIANCE
227 Massachusetts Avenue, N.E.
Suite 302
Washington, D.C. 20002
Tel.: 202-548-0202

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SUMMARY

The Independent Telephone and Telecommunications Alliance ("ITTA"), the Western Telecommunications Alliance ("WTA"), and TDS Telecommunications ("TDS") submit this Petition to seek reconsideration of the Commission's recent *ETC Designation Order* ("*Order*") adopting criteria for the designation of competitive eligible telecommunications carriers ("ETCs") by the Commission. Although the *Order* took important steps toward developing a rigorous ETC designation process, certain aspects of the *Order* require reconsideration because they do not comply with the plain language of the governing statute and they fail to promote sufficient accountability and integrity in universal service funding. Revising the ETC designation guidelines as we propose would better ensure that the resources of the Universal Service Fund ("USF" or "Fund") are distributed only to carriers that meet the statutory eligibility requirements and are truly committed to fulfilling the goals of the federal USF.

The long-term viability of the Fund is an area of increasing concern as both the size of the Fund and the number of carriers drawing universal service support expand. If these trends continue unchecked, they threaten to jeopardize the very existence of the USF. The Commission itself has recognized the importance of preserving and protecting the Fund by ensuring that USF support is paid only to eligible carriers who are capable of, and evidence a commitment to, providing universal service throughout the designated service area. However, the *ETC Designation Order* fell unlawfully and unreasonably short of that goal in a number of respects. Specifically, the *Order* violated the clear language of the statute governing ETC eligibility and undermined the statutory policy goals in the following respects:

- Service Area Coverage: Section 214(e)(1) of the Communications Act provides that ETCs "shall" offer and advertise supported services "throughout the service area" in which they are designated. The *Order* effectively rewrote this provision by allowing carriers to receive support in exchange for promises to "improve"

service in the designated wire centers over a five-year period. Under the *Order*, ETCs are *never* required to achieve the ubiquitous coverage throughout the designated service area that is mandated by the statute and by state regulations governing carriers of last resort. Similarly, the tepid requirement that competitive ETCs provide service to "all requesting customers" when possible "at reasonable cost" is neither sufficient to satisfy the statutory requirement nor comparable to the service provided by incumbent ETCs serving as carriers of last resort. The Commission's approach represents plain error and reflects a policy shift not endorsed by Congress.

- Impact on the Fund: In declining to adopt ETC designation criteria that take into account the overall impact of ETC designations on the Fund, the Commission failed to fulfill its statutory responsibility to protect the long-term viability of the Fund. Although the *Order* noted that each individual designation has only a negligible effect on the overall Fund, the Commission and commenters have acknowledged the *aggregate* effects of competitive ETC designation on the Fund. A number of approaches have been proposed to moderate the impact of unlimited ETC designation on the Fund, and the Commission's failure to pursue those options undermines the statutory policy goals.

- Guidelines for State ETC Designation: The Commission's failure to mandate that state commissions apply minimum ETC designation criteria consistent with those adopted in the *Order* undermines the statutory principle that universal service support be "predictable and sufficient." State regulators have little economic incentive to ensure that federal USF funds are allocated judiciously among only qualified carriers, and record evidence suggested that mandatory federal guidelines were necessary to ensure consistent, predictable designation of ETCs nationwide.

- Pending Petitions: In granting pending petitions to redefine rural service areas without applying the standards set forth in the *Order*, the Commission abdicated its statutory responsibility to play an active role in determining whether redefining a rural service area will serve the public interest. That decision, along with the rule allowing pending ETC petitions to be granted even where the petitioner has not demonstrated that it meets the eligibility requirements set forth in the *Order*, harms the integrity of the Fund and will result in the distribution of federal USF support to carriers in circumstances that the Commission itself has determined are inconsistent with the public interest.

ITTA, WTA, and TDS urge the Commission to remedy these defects on reconsideration. The proposed changes are necessary to bring the Commission's rules in line with the underlying statute and to further the goal of an efficient, judiciously-administered universal service program that advances and achieves the statutory objectives.

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PETITION FOR RECONSIDERATION

The Independent Telephone & Telecommunications Alliance ("ITTA"), the Western Telecommunications Alliance ("WTA"), and TDS Telecommunications ("TDS") seek reconsideration of the *ETC Designation Order* (the "*Order*")[1] because the *Order* fails to adhere to the plain-language requirements of the Communications Act for the designation of eligible telecommunications carriers ("ETCs"). The *Order* also fails to promote accountability and integrity in the administration of the Universal Service Fund ("USF" or "Fund"), a goal that clearly is in the public interest and consistent with Congressional mandates.

The Commission itself has recognized the statutory obligation and fiscal importance of ensuring that universal service support is paid only to eligible carriers that are capable of, and committed to, providing truly universal service throughout the designated service area. The *Order* took some steps toward achieving that goal, but fell unlawfully and unreasonably short in a number of important respects. The Commission should remedy these defects on reconsideration, both to bring the Commission's rules in line with statutory requirements and to further the goal of an efficient and prudently-administered universal service program that advances and achieves the statutory objectives.

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[1] Report and Order, *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, FCC 05-46 (rel. March 17, 2005) (*ETC Designation Order*).

I. BACKGROUND

The universal service provisions of the Communications Act of 1934, as amended (the "Act"), charge the Commission with adopting policies that effectively advance the fundamental goal of universal service: ensuring that consumers throughout the country have continued access to quality telecommunications services at just, reasonable, and affordable rates.[2] Accomplishing that goal requires the Commission (1) to limit the support paid out of the Fund to services and carriers that serve the Fund's underlying objective, and (2) to manage prudently the size of the Fund so that consumers' contributions to the Fund remain reasonable.

In recent years, the long-term viability of the Fund has become an area of increasing concern as both the number of carriers drawing universal service support and the overall size of the Fund have increased sharply.[3] One source of this rapid growth is the growing number of competitive ETC ("CETC") designations in high-cost areas. In *Virginia Cellular*, the Commission explained that it was "increasingly concerned about the impact on the universal service fund due to the rapid growth in high-cost support distributed to competitive ETCs."[4] On top of these growing burdens, the Commission has recently highlighted the potential for – and need to remedy – fraud, waste, and misuse of universal service support.[5]

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[2] *See* 47 U.S.C. § 254(b).

[3] Referral Order, *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, FCC 02-307, ¶ 4 (rel. Nov. 8, 2002) (*ETC Referral Order*).

[4] Memorandum Opinion and Order, *Federal-State Joint Board on Universal Service, Virginia Cellular, LLC Petition for Designation as an Eligible Telecommunications Carrier in the Commonwealth of Virginia*, CC Docket No. 96-45, FCC 03-338, ¶ 31 (rel. Jan. 22, 2004) (*Virginia Cellular*).

[5] Although most investigations into waste, fraud, and abuse have focused on the USF's "e-rate" program, the recently-initiated proceeding examining USF administration seeks to minimize fraud and abuse in all USF programs. *See* Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking, *Comprehensive Review of Universal Service Fund Management, Administration, and Oversight*, WC Docket No. 05-195, FCC 05-124 (rel. June 14, 2005).

To address these and other concerns, the Commission asked the Federal-State Joint Board on Universal Service (the "Joint Board") to review various rules relating to high-cost universal service, including ETC designation and USF funding.[6] The Joint Board responded with a *Recommended Decision*[7] on which the Commission sought comment.[8] In comments on the *Recommended Decision*, several carriers emphasized the need for strict ETC designation criteria to match the plain-language requirements of the Act and to improve accountability, reduce abuse, and ensure that the Fund remains stable and available to serve its universal service purpose for Americans in rural and high-cost areas.[9] On March 17, 2005, the Commission released the *ETC Designation Order*. Although the *Order* took some significant steps to reform the ETC designation process, it fell short of requiring full compliance with the applicable statutory requirements. Absent reconsideration, the *Order* may not withstand judicial review. In addition, the *Order* did not do enough to ensure accountability and integrity in the administration of the Fund. Accordingly, we ask the Commission to reconsider the *Order* and implement the recommendations described below.

II. THE COMMISSION'S RULES FALL SHORT OF REQUIRING CARRIERS SEEKING ETC DESIGNATION TO PROVIDE SERVICE THROUGHOUT THE ENTIRE DESIGNATED SERVICE AREA

Section 214(e)(1) of the Act explicitly provides that designated ETCs "*shall*" offer and advertise all supported services "*throughout* the service area for which the designation

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[6] *ETC Referral Order*.

[7] Recommended Decision, *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, 19 FCC Rcd 4257 (2004) (*Recommended Decision*).

[8] Notice of Proposed Rulemaking, *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, FCC 04-127 (rel. June 8, 2004) (*Notice of Proposed Rulemaking*).

[9] *See, e.g.*, Comments of TDS Telecommunications Corporation in CC Docket No. 96-45, at 4-11 (Aug. 6, 2004); Comments of Western Telecommunications Alliance in CC Docket No. 96-45, at 8-17 (Aug. 6, 2004).

is received."[10] But the ETC criteria adopted in the *Order* violate these plain-language requirements because they do not require petitioners seeking ETC designation to satisfy these requirements prior to (or even shortly after) being granted ETC designation.[11] Instead, the *Order* merely requires some level of "network improvement" over a five-year period and the provision of service upon specific request within a reasonable period of time after designation where service can be provided at reasonable cost.[12]

In the *Order*, the Commission required applicants to demonstrate their *future* willingness to providing services throughout the service area by (1) "submitting a formal [*five-year*] network improvement plan" showing how the carrier plans to use universal service funding to "improve" its network coverage in every wire center in which it is designated an ETC, and (2) by "providing services to all requesting customers within its designated service area" in specified circumstances.[13] These measures fall short of what Congress required when it authorized the provision of universal service support to qualified competitive carriers under Section 214(e)(1).

The five-year network improvement plan certainly marks progress by requiring long-term network investment in all designated wire centers, but it revises the bargain that Congress struck in crafting Section 214(e). *First*, the Commission's approach provides federal USF support to carriers *before* they have satisfied the statutory requirements. Congress stipulated that a carrier "shall be eligible" for funds if it is designated as an ETC, "and shall,

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[10] 47 U.S.C. § 214(e)(1) (emphases added).

[11] See *Virginia Cellular* ¶ 17.

[12] *ETC Designation Order* ¶ 22.

[13] *Id.* ¶¶ 21-24.

throughout the service area for which the designation is received offer the services . . . ."[14] The statutory language does not say, "shall, at some time in the future, have plans to offer . . .," because that formulation runs counter to the goal that Congress sought to achieve: universal service funds should go to carriers willing and able to provide service to high-cost areas upon receipt of funds. A mere promise to offer service in the future, in return for receiving funds today, does not meet the statutory requirement of "shall offer." *Second*, the *Order* allows a carrier to continue to receive USF funding even though it *never* meets the statutory requirement of ubiquitous coverage "throughout the designated service area." The *Order* requires only that carriers show how universal service support will "improve coverage, signal strength, or capacity that would not otherwise occur" without federal funding.[15] The *Order* does not require the carriers to show how this support will lead to full coverage consistent with the statutory mandate and with state requirements governing incumbent ETCs serving as carriers of last resort.

Moreover, the *Order*'s requirement that petitioners for ETC designation commit to serving requesting customers in specified circumstances does not achieve the result of mandating service "throughout the service area." The difference reflects a policy shift not endorsed by Congress. As state carrier-of-last-resort ("COLR") requirements make clear, an incumbent ETC typically must fulfill *all* customer requests for service anywhere in the local service area, with few if any exceptions.[16] The *Order*, by contrast, requires designated ETCs to provide service to requesting customers only "within a reasonable time *if service can be provided*

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[14] 47 U.S.C. § 214(e)(1) (punctuation omitted).

[15] *ETC Designation Order* ¶ 21.

[16] *See, e.g.,* Florida Public Service Commission, Final Order Determining Appropriate Interim Universal Service/Carrier of Last Resort Mechanism, *Determination of Funding for Universal Service and Carrier of Last Resort Responsibilities*, Docket No. 950696-TP, Order No. PSC-95-1592-FOF-TP (rel. Dec. 27, 1995) ("[T]he COLR is the provider that must provide basic service at affordable rates to any customer in its service territory.")

at a reasonable cost."[17] The effect of this rule will be to allow CETCs to recover support for the high-cost, difficult-to-reach customers within their designated service areas while simultaneously avoiding any obligation to serve them. These customers are precisely the individuals that Congress intended to benefit from the creation of the Fund.

Although the somewhat tighter and more specific ETC designation criteria adopted in the *Order* represent a positive step, additional measures are needed to satisfy the requirements of Section 214(e)(1) and to ensure that USF funds are distributed prudently and for their intended purpose. Without relinquishing the position that Section 214(e)(1) as a matter of law requires an eligible carrier to be prepared to offer service throughout the designated service area immediately upon receipt of funds, we posit some reforms for the Commission's consideration. One option would be to require petitioners' network-improvement plans to demonstrate how federal universal service support will be used to lead ultimately to 100% network coverage. Once a petitioner is designated as an ETC, the Commission could increase accountability by requiring the ETC to achieve 100% coverage throughout the designated geographic service area within a specified time, consistent with its build-out plan and the state requirements for COLRs. At that point, the CETC should be required to comply with all state COLR obligations and be willing and able to serve the designated area as the sole COLR.

[17] *ETC Designation Order* ¶ 22 (emphasis added).

III. TO FULFILL ITS SPECIFIC PUBLIC INTEREST MANDATE, THE COMMISSION SHOULD ADOPT CRITERIA THAT RECOGNIZE THE OVERALL IMPACT OF INDIVIDUAL ETC DESIGNATIONS ON THE FUND

Sections 214(e)(2) and 214 (e)(6) require both the Commission and state commissions to determine whether an ETC designation is in the public interest.[18] This public interest requirement is in addition to the Commission's general public interest obligation under the Act, and underscores the need for detailed criteria that serves this Congressional purpose. Although Congress did not establish specific criteria to be applied in the public interest analysis governing ETC designation, the Commission explained in the *Order* that the public interest benefits "must be analyzed in a manner that is consistent with the purposes of the Act itself, including the fundamental goal of preserving and advancing universal service."[19]

To promote these fundamental goals, the Commission has recognized the need for a more stringent public interest analysis for ETC designations in rural areas.[20] For instance, in *Virginia Cellular*, the Commission established an interim framework to be applied in assessing whether a designation would serve the public interest.[21] The Commission explained that, within this framework, one important factor to consider was the impact that an ETC designation would have on the Fund.[22] Although the *Virginia Cellular* framework represented an important step, various commenters urged the Commission to adopt more specific criteria that would allow the

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[18] *See* 47 U.S.C. § 214(e)(2).

[19] *ETC Designation Order* ¶ 40.

[20] *Virginia Cellular* ¶ 4.

[21] *Id.*

[22] *Id*. ¶ 31 ("[I]n determining public interest, we weigh numerous factors, including . . . the impact of multiple designations on the universal service fund. . . ."). *See also*, Memorandum Opinion and Order, *Federal-State Joint Board on Universal Service, Highland Cellular, Inc. Petition for Designation as an Eligible Telecommunications Carrier in the Commonwealth of Virginia*, CC Docket No. 96-45, FCC 04-37, ¶ 4 (rel. Apr. 12, 2004) (*Highland Cellular*).

overall impact on the Fund to be taken more clearly into account in individual ETC designation proceedings.[23]

In the *Order*, however, the Commission declined to adopt any such requirements, reasoning that "analyzing the impact of one ETC on the overall fund may be inconclusive," and that "given the size of the total high-cost fund – approximately $3.8 billion a year – it is unlikely that any individual ETC designation would have a substantial impact on the overall size of the fund."[24]

This approach is in error because it fails to recognize that individual ETC designations necessarily take place within a larger framework that substantially impacts the Fund. Although it may be true that any one designation, taken alone, may not significantly impact the Fund, the aggregation of these designations has a significant impact upon the Fund that should be taken into account. For instance, Commissioner Abernathy noted in *Virginia Cellular* that "the dramatic rate of growth . . . compels us to consider the *overall impact* of new ETC designations on the stability and sustainability of universal service."[25] Elsewhere in the *Order*, the Commission itself recognized that the aggregation of individual designations can impact the Fund: "While Congress delegated to individual states the right to make ETC decisions, *collectively* these decisions have national implications that affect . . . the overall size of the federal universal service fund."[26] It is arbitrary and capricious for the Commission to

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[23] *See, e.g.,* Comments of the Organization for the Promotion and Advancement of Small Telecommunications Companies in CC Docket No. 96-45, at 36-38 (Aug. 6, 2004) (OPASTCO Comments).

[24] *ETC Designation Order* ¶ 54.

[25] *Virginia Cellular*, Separate Statement of Commissioner Kathleen Q. Abernathy, at 1 (emphasis added).

[26] *ETC Designation Order* ¶ 60 (emphasis added).

recognize the effects of aggregation in one area but to ignore them entirely in another. The Commission has the opportunity to correct this error in response to this Petition.

In light of the aggregate effect of ETC designations on the Fund, the Commission should provide more specific guidance about how that impact should be taken into account in individual ETC designation proceedings. Contrary to the *Order*'s assertion,[27] it is possible (and beneficial to the public interest) to adopt workable criteria that can manage costs and mitigate the adverse impact on the Fund by the aggregate designation of CETCs. Though not exhaustive, we propose the following options to promote and protect the viability of the Fund.

The first option would be per-line benchmarks. The *Order* recognized that "if per-line support is high enough, . . . funding multiple ETCs in such areas could impose strains on the universal service fund."[28] Adopting more specific per-line benchmarks would both address these concerns and reflect the economic reality that the public interest is not well-served by distributing excessive federal funds to areas where economics do not even justify service by a single carrier. In rejecting per-line benchmarks, the *Order* placed too much emphasis on the need to protect competition.[29] As Chairman Martin has repeatedly emphasized, the goal of universal service is *not* to promote competition but to "ensure that all consumers . . . have access at affordable rates."[30] By rejecting this reasoning, the *Order* threatens to sacrifice consumer

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[27] *Id*. ¶ 56.

[28] *Id*. ¶ 55.

[29] *Id*. ¶ 56 ("Many commenters have argued that a per-line benchmark . . . may prevent consumers in high-cost areas from receiving the benefit of competitive service offerings.").

[30] *Highland Cellular*, Dissenting Statement of Commissioner Kevin J. Martin, at 1. *See also Virginia Cellular*, Dissenting Statement of Commissioner Kevin J. Martin, at 1; Second Report and Order and Further Notice of Proposed Rulemaking, *Multi-Association Group Plan for Regulation of Interstate Services of Non-Price Cap Incumbent Local Exchange Carriers and Interexchange Carriers*, CC Docket No. 00-256, FCC 01-304 (rel. Nov. 8, 2001) (*MAG Order*) (Separate Statement of Commissioner Kevin J. Martin) ("I have some concerns with the

(continued…)

access for the sake of competition. Although competition is certainly one of the goals of the Telecommunications Act of 1996, it is not one of the paramount goals of section 254 and the universal service program, which has as its goal to ensure access in rural and high-cost areas.

In justifying its rejection of per-line benchmarks, the Commission asserted that it lacked "an adequate record to determine what specific benchmark or benchmark[s] should be set."[31] However, the comments did include per-line benchmark proposals that offered workable criteria. For example, the comments of the National Association of State Utility Consumer Advocates ("NASUCA") outlined a model proposed by Joint Board member Billy Jack Gregg at the meeting of the Joint Board on July 31, 2003.[32] Under this proposal, in rural study areas receiving $30 or more of per-line support, the Commission would establish a presumption that additional ETCs are not in the public interest. In areas that receive $20 or more of per-line support, the Commission would presume that only one additional ETC (in addition to the ILEC) should be designated. In areas receiving less than $20 in per-line support, there would be no presumed limit on the number of designated ETCs.[33]

In any event, if the Commission believed that it lacked an adequate record to adopt a per-line benchmark, the more appropriate response would have been to issue a public notice while it was evaluating the *Recommended Decision* or a Further Notice of Proposed Rulemaking with the *Order* seeking more specific comments on an appropriate per-line

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(continued…)
Commission's policy . . . of using universal service support as a means of creating 'competition' in high cost areas.")

[31] *ETC Designation Order* ¶ 56.

[32] Comments of National Association of State Utility Consumer Advocates ("NASUCA") in CC Docket No. 96-45, at 42-44 (Aug. 6, 2004) (NASUCA Comments).

[33] *Id.*

benchmark. The latter approach is precisely what the Joint Board recommended.[34] As the Joint Board explained, per-line benchmarks would be determined by the level of high-cost support, which is "a concrete, objective, transparent, and readily obtainable factor that may help state commissions avoid generalized or abstract arguments about the harms or benefits of additional ETCs."[35] In part because of these low administrative costs, the Joint Board encouraged state commissions to consider the level of high-cost per-line support in making their public interest determinations.[36]

A second option would be to cap the total number of competitive ETCs that could receive universal service support for serving a high-cost area. Such a cap would be easy to enforce and would promote efficiency and preserve the viability of the Fund by limiting excess federal funding in high-cost areas. Although the *Order* rejected the argument that individual high-cost service areas should be limited to only one wireline ETC and one wireless ETC,[37] that is not the only conceivable cap that could be applied. For instance, more than two ETCs could be permitted, or a cap could be applied only in areas where costs exceed a certain benchmark.

A third possibility would be to deny ETC designation to wireless petitioners where universal service support is limited to mechanisms designed to replace lost access charges. For example, the Interstate Common Line Support ("ICLS") mechanism was intended to replace access charges that had been assessed by rate-of-return ("ROR") carriers prior to the *MAG Order*

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[34] *Recommended Decision* ¶ 44 ("We do . . . recommend that the Commission solicit comment on whether such national benchmarks merit additional consideration.").

[35] *Id.* ¶ 43.

[36] *Id.*

[37] *ETC Designation Order* ¶ 57.

access charge reductions.[38] Where an ROR carrier recovers ICLS but no high-cost support, it may be inappropriate to provide that support to wireless carriers that have never recovered access charges and that typically recover service costs from their end users under a called-party-pays system. By essentially providing wireless carriers with money for nothing, the current system seems to violate the principle of "competitive neutrality."

The *Order* implied that it would be premature to adopt specific criteria to assess the impact of an individual ETC designation on the Fund in light of other pending proceedings such as the *Rural High-Cost* proceeding.[39] As a number of rural telephone companies have noted,[40] the most effective means for controlling the growth of the Fund is not by modifying the mechanisms used to calculate high-cost support (and potentially providing incumbent ETCs with insufficient support to serve rural consumers), but by ensuring that ETC designations are limited to carriers committed to providing truly universal service. It is therefore unnecessary to await resolution of the *Rural High-Cost* proceeding before adequately strengthening the ETC designation criteria.

IV. THE COMMISSION SHOULD REQUIRE STATE COMMISSIONS TO APPLY MINIMUM ELIGIBILITY REQUIREMENTS BEFORE DESIGNATING ELIGIBLE TELECOMMUNICATIONS CARRIERS

The *Order* adopted new guidelines establishing additional minimum eligibility requirements to be applied in evaluating ETC petitions submitted to the Commission.[41] These new guidelines are mandatory in ETC designation proceedings in which the Commission acts

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[38] *MAG Order* ¶ 128.

[39] *ETC Designation Order* ¶ 54. *See also* Order, *Federal-State Joint Board on Universe Service*, CC Docket No. 96-45, 19 FCC Rcd 11538 (2004) (*Rural High-Cost Referral Order*).

[40] *See, e.g.,* Comments of TDS Telecommunications in CC Docket No. 96-45, at i-ii (Oct. 15, 2004).

[41] *ETC Designation Order* ¶¶ 17-19.

pursuant to Section 214(e)(6), but merely permissive in state ETC designation proceedings.[42] The Commission did, however, encourage state commissions to apply these new requirements as a matter of policy.[43]

The Commission acknowledged that applying ETC guidelines in all states would further a number of important policy goals such as promoting predictability, improving long-term sustainability, and ensuring that support is paid only to fully qualified carriers committed to providing universal service.[44] These guidelines would also ensure that state ETC proceedings do not undermine the *statutory* requirements that universal service support be "predictable and sufficient."[45]

By ultimately making the ETC criteria permissive rather than mandatory guidelines, the Commission undermined the very policy goals it sought to advance. Past experience suggests that some state commissions need more than just "encouragement" to apply rigorous standards for ETC designation. Some states seem to view the Fund as a source of additional federal funding that should be maximized whenever possible. Given that the approving state is, in essence, spending someone else's money to finance investment in their state, that outcome is not surprising. Allowing this approach to continue, however, departs from the statutory and policy principles governing universal service by undermining predictability (e.g., creating disparities between "permissive" states and states applying more rigorous standards) and by threatening to dilute universal service funds among an economically inefficient number of carriers.

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[42] *Id*. ¶¶ 1, 58-64.

[43] *Id*. ¶ 58.

[44] *Id.*

[45] *See* 47 U.S.C. § 254(b)(5).

To ensure that the ETC designation process is rigorous in all states, the Commission should establish *mandatory* minimum eligibility requirements that state commissions must find are satisfied before they can designate a CETC to receive universal service support. The Commission has the authority to impose such mandatory minimum guidelines, which state commissions would then have flexibility in interpreting and applying to local circumstances. The Fund is a federally-administered creation of the Act, and section 201(b) of the Act "explicitly gives the FCC jurisdiction to make rules governing matters to which the 1996 Act applies," even where those rules might affect the exercise of state regulatory jurisdiction under the Act.[46] Thus, just as the Commission had the authority to promulgate the rules and methodology to be applied by state commissions arbitrating local interconnection agreements,[47] the Commission can prescribe the guidelines to be applied by state commissions evaluating applications for ETC designation under Section 214(e)(2) of the Act.

In addition, federal mandatory *minimum* requirements for ETC designation are readily distinguishable from the rules struck down by the Fifth Circuit Court of Appeals in *Texas Office of Public Utility Counsel v. FCC*.[48] There, the Commission had interpreted the Act to prohibit states from imposing service quality standards in making competitive ETC determinations.[49] The court rejected the Commission's interpretation, holding that the Commission could not bar states from imposing *additional* requirements beyond those listed in

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[46] *AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366, 380 (1999) (emphasis in original). The Court added, "While it is true that the 1996 Act entrusts state commissions with the job of approving interconnection agreements, . . . these assignments . . . do not logically preclude the Commission's issuance of rules to guide the state-commission judgments." *Id*. at 385.

[47] *Id.* at 378.

[48] 183 F.3d 393 (5th Cir. 1999).

[49] *Id*. at 417-18.

Section 214(e)(1) of the Act.[50] *Texas Public Utility Counsel* did not, however, limit the Commission's ability to set a "floor" prescribing the showing that must be made before a state commission can find that the requirements set forth in Section 214(e)(1)-(2) have been met.

Although the *Order* offered several justifications for adopting permissive guidelines, many of these arguments are misplaced. For instance, the Commission rejected the argument that minimum mandatory guidelines are necessary to reduce waste, fraud, and abuse. The Commission reasoned that, in the case of misuse, state commissions could always withdraw an ETC designation or decline to recertify a carrier.[51] State commissions, however, have no financial incentive to police these abuses. The Fund consists of contributions collected from consumers nationwide, and the costs of any USF abuse would be borne by those consumers rather than by a particular state or a particular state's consumers. States that receive USF payments that exceed the contributions paid by the state's consumers (and thus are net USF payees) bear little of the costs of universal service support and have no economic incentive to distribute that support judiciously within their states. Instead, they may have every incentive to obtain as much support as possible to promote increased wireless coverage (even if not ubiquitous) in the state. Minimum mandatory guidelines are therefore necessary to promote accountability and ensure that net payee states do not undermine the stability of the Fund.

The *Order* also claimed that permissive guidelines were necessary to preserve the authority and flexibility of states to make designations that take unique local conditions into

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[50] *Id*. at 418. Under *Texas Public Utility Counsel*, states will remain free to adopt requirements above and beyond any minimum eligibility requirements adopted by the Commission. The petitioners agree with this result. *See also Recommended Decision* ¶ 32.

[51] *ETC Designation Order* ¶ 62.

account.[52] Mandatory minimum requirements, however, would merely establish a *minimum* baseline. States would retain the final authority to apply those criteria to local circumstances in reviewing petitions for ETC designation and would be free to adopt additional requirements that go beyond these mandatory minimum requirements.

V. THE COMMISSION SHOULD HAVE APPLIED THE CURRENT REDEFINITION STANDARDS TO PENDING PETITIONS FOR REDEFINITION OF LOCAL SERVICE AREAS

Section 214(e)(5) permits redefinition of a rural telephone company service area only where both the state *and the Commission* agree independently to redefine the service area.[53] In *Virginia Cellular*, the Commission established certain standards that must be satisfied before the Commission will grant a petition for redefinition.[54] In the *Order*, the Commission concluded that the standards set forth in *Virginia Cellular* and *Highland Cellular* should continue governing redefinition determinations.[55] Despite this conclusion, the Commission granted several pending redefinition petitions even though the Commission conceded that these petitions did not satisfy the applicable standards.[56] This arbitrary and capricious decision harms the integrity of Fund. The Commission should take this opportunity to reconsider the grant of these petitions and to apply the current redefinition standards to all pending petitions.

In granting the redefinition petitions, the Commission acted arbitrarily by not fulfilling its obligation to evaluate independently whether redefinition of a rural telephone company study area meets the proper standards. In fact, the Commission explicitly conceded

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[52] *Id.* ¶ 61.

[53] *See* 47 U.S.C. § 214(e)(5).

[54] *Virginia Cellular* ¶ 28.

[55] *ETC Designation Order* ¶¶ 78-79.

[56] *Id.*

that it was approving redefinition petitions that failed to satisfy current redefinition standards. For instance, some of the approved redefinition petitions lacked the necessary analysis.[57] Other approved petitions resulted in designations of ETCs serving only a portion of a rural telephone company's wire center[58] – an approach explicitly rejected in *Highland Cellular*.[59]

Elsewhere in the *Order*, the Commission noted, "We do not believe that different ETCs should be subject to different obligations, going forward, because of when they happened to first obtain ETC designation. . . . These are responsibilities associated with receiving universal service support that apply to all ETCs, regardless of the date of initial designation."[60] The same logic applies to pending redefinition petitions. Redefinition affects the ETCs' responsibility to provide service throughout the designated service area. It is arbitrary and capricious for the Commission to allow some ETCs to serve less than an entire rural telephone company service area (or even less than a single rural telephone company wire center) simply because of the date on which their petitions were filed or approved by the state commissions.

Accordingly, we urge the Commission to revisit the redefinition petitions granted in the *Order* and to apply the criteria endorsed in the *Order* to determine whether approving the requested rural telephone company service area redefinitions is consistent with current standards. Although this may result in the revocation of ETC designations in certain partial rural telephone company service areas, such a result is appropriate where the public interest is not being served by the requested designations. Moreover, we note that revocation of the affected ETC designations will have a relatively minor impact. The affected carriers' authorization to serve

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[57] *Id.* ¶ 78.

[58] *Id.*

[59] *See Highland Cellular* ¶ 33.

[60] *ETC Designation Order* ¶ 20.

the relevant areas will not be affected. The carriers will simply be disqualified from receiving federal USF support for a small portion of their licensed service areas.

VI. THE COMMISSION SHOULD APPLY THE CURRENT ETC DESIGNATION CRITERIA TO PENDING PETITIONS FOR ETC DESIGNATION

The new rules established by the *Order* will allow certain carriers that do not satisfy the eligibility requirements set forth in the *Order* to be designated as ETCs. Under new Section 54.202(b) of the rules, carriers that submitted petitions for ETC designation prior to the effective date of the *Order* need only demonstrate compliance with the new ETC designation criteria by October 1, 2006 (presumably after being designated as an ETC) when they submit their annual certification information.[61] Thus, for a significant period of time after the *Order* is released, carriers that would be ineligible under the new requirements may nonetheless be designated as ETCs. This approach was neither discussed nor justified in the *Order* itself, which spoke only to the eligibility of carriers that had already been designated.[62]

At a time when the Commission has expressed concern about the integrity and continuing viability of the USF, it is unreasonable to designate ETCs that have not satisfied the minimum eligibility requirements adopted in the *Order* to protect the Fund. As noted above, the responsibilities of ETCs, and their collective impact upon the Fund, remain the same regardless of when the carriers filed the designation petitions. Although ETC status may be revoked if pending ETC petitioners fail to meet the appropriate criteria by October 1, 2006, there is no reason to distribute USF funds to such carriers for an interim period during which they do not satisfy current ETC designation criteria.

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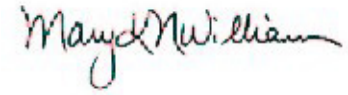
[61] *ETC Designation Order*, Appendix C (Final Rules).

[62] *ETC Designation Order* ¶ 2.

CONCLUSION

For the foregoing reasons, the Commission should reconsider the decisions made in the *ETC Designation Order* and remedy the defects identified in this Petition. Modifying the *ETC Designation Order* as proposed here is necessary to bring the Commission's rules in line with statutory requirements and to further the goal of an efficient and prudently-administered universal service program that advances and achieves the statutory objectives.

Respectfully submitted,



Gerard J. Waldron
Mary Newcomer Williams
John Blevins
COVINGTON & BURLING
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20004-2401
Tel.: 202-662-6000
Fax: 202-662-6291
Counsel to TDS Telecommunications

David W. Zesiger
Executive Director
INDEPENDENT TELEPHONE &
TELECOMMUNICATIONS ALLIANCE
888 16th Street, N.W.
Suite 800
Washington, D.C. 20006
Tel.: 202-355-1388
Fax: 202-355-1399

Derrick B. Owens
Director of Government Affairs
WESTERN TELECOMMUNICATIONS ALLIANCE
227 Massachusetts Avenue, N.E.
Suite 302
Washington, D.C. 20002
Tel.: 202-548-0202

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